Supreme Court, U.S.
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No.01-1318

IN THE
SUPREME COURT OF THE UNITED STATES

BZAPS, Inc., a Minnesota corporation,

Petitioner,

vs.

City of Mankato, a municipal corporation,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

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INTRODUCTION

This supplemental brief is submitted pursuant to Supreme Court Rule 15.8, on the basis of a new case, recently decided, not available at the time of Petitioner's last filing.

ARGUMENT

On May 13. 2002, this Court decided *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S.____(May 13, 2002). Although the decision in that case ultimately favored the City of Los Angeles, over the adults-only video store/arcade challenging the ordinance in question, it is clear from the plurality, concurring, and dissenting opinions that the proper disposition of the above-entitled matter would be to grant the writ of certiorari, vacate the judgment below, and remand the matter for reconsideration in light of *Alameda Books.*

Of key importance is the following language from the plurality opinion of Justice O'Connor concerning the evidentiary burden upon municipalities to justify adult entertainment zoning ordinances under a "secondary effects" theory:

> "In *Renton*,...[w]e held that municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest [Citations omitted.] This is not to say that a municipality can get

> away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If Plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If Plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." [Citation omitted.] Slip opinion at pp. 10-11.[1]

Judged by the foregoing evidentiary standard, Petitioner's entitlement to relief is clear.

1To be sure, this standard clearly represents only the stated view of four justices, to-wit: Justices O'Connor, Chief Justice Rehnquist, Justice Scalia and Justice Thomas. However, it is clear that the four dissenting Justices, Souter, Stevens, Ginsburg, and Breyer, would require a far more stringent evidentiary showing on the part of government. See for example, slip opinion at pp. 6-7, Souter J. dissenting. Consequently, it is clear that the foregoing quotation from the plurality opinion represents the bare minimum which a majority of this Court would require in order to justify an adult entertainment regulation premised on a secondary effects theory. It is clearly the standard which now governs the instant case.

To begin with, this case presents precisely the "shoddy data and reasoning" condemned by the plurality opinion in *Alameda Books*. The studies relied upon by the City of Mankato in adopting its initial adult entertainment zoning ordinance where the very studies demonstrated to be woefully inadequate to support any causal connection between adult entertainment and adverse secondary effects in the amicus briefs of the First Amendment Lawyers Association submitted in both *Alameda Books* and *City of Erie v. Pap's A.M.*, 527 U.S. 277 (2000).[2]

Moreover, even conceiving the validity of said studies for some purposes, the city's own planning director conceding that none of the studies demonstrated that a single showing of sexually explicit live entertainment at an otherwise non-adult entertainment venue would lead to any adverse secondary effects; indeed, he conceded that the city had no evidence from any jurisdiction anywhere in the United States that this was the case.[3] He further admitted that the municipality's own

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2The findings appended to the FALA amicus briefs were published in a peer reviewed article, Paul, Linz & Shafer, Government Regulation of 'Adult' Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects, 6 Comm.L & P. 355 (2001).

3See Petitioner's Appendix at G-5-G.14.

experience with existing adult entertainment establishments, which featured adult entertainment on a full-time basis, was that none had caused any adverse secondary effects and that absence of such secondary effects were a reason that the city did not amortize out non-conforming uses.

He further admitted that the city's own experience was that other venues outside the adult entertainment zone had, for years, regularly featured single-night performances of a partially nude male review, indistinguishable from the one sought to be hired by Petitioner, and that there was no evidence whatsoever of adverse secondary effects from such performances. Id. at G-21-G-22.

Plainly, under these facts, the city has failed to meet even its initial burden of proof that its evidence must "fairly support the municipality's rationale for its ordinance." *Alameda Books*, Slip opinion at p. 11.

Moreover, it is equally clear that above and beyond these vast deficiencies in the city's proof, Petitioner tendered evidence further disputing the municipality's factual findings, pointing out that within the City of Minneapolis, the Chippendales, a semi-nude dance review, indistinguishable from the performers Petitioners sought to hire, had engaged in a one-night performance at the historic State Theater in Minneapolis, Minnesota, which performance had resulted in no law

enforcement problems whatsoever and no decline in the values of nearby property. Id. at K-1-K-25.

Under the formulation adopted by this Court in *Alameda Books*, the city would have been able to justify its ordinance, only if it came forward with evidence supporting its rationale, something it plainly failed to do.

Obviously, neither the Eighth Circuit nor the United States District Court in the instant case had the benefit of this Court's evidentiary standards adopted in *Alameda Books*. Obviously if they had, they would not have reached the results they did.

Accordingly, in the event that the decision of the Eighth Circuit is not similarly reversed due to the inadequacy of the city's showing under the *Alameda Books* standards, certiorari should be granted, the judgment vacated and the matter remanded for reconsideration in light of the standards adopted in *Alameda Books*.

Respectfully submitted,

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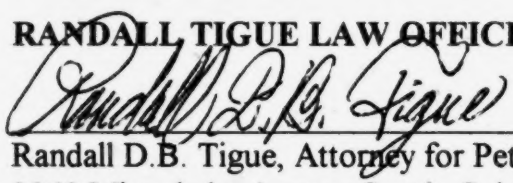

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